IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 12, 2003 Session

KEITH AND WENDY DOWNEN, Individually and as Parents and Next of Kin of ADAM TROY DOWNEN, v. MICHAEL ANGELO TESTA and CAROL ANNE TESTA

Direct Appeal from the Circuit Court for Knox County
No. 3-607-00 Hon. Wheeler A. Rosenbalm, Circuit Judge

FILED MAY 1, 2003

No. E2002-01320-COA-R3-CV

Trial Court granted social hosts summary judgment on grounds that "consumption" of alcohol and not the furnishing was proximate cause of death, pursuant to Tenn. Code Ann. § 57-10-101. We affirm on that ground, but vacate in part as to voluntary assumption of duty.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part, Vacated in Part, and Remanded.

HERSCHEL PICKENS FRANKS, J., delivered the opinion of the court, in which HOUSTON M. GODDARD, P.J., and CHARLES D. SUSANO, JR., J., joined.

Robert E. Pryor, and Perry H. Windle, III, Knoxville, Tennessee, for Appellants.

Edward U. Babb, Knoxville, Tennessee, for Appellees.

OPINION

In this wrongful death action, the Trial Court granted defendants summary judgment, and plaintiffs have appealed.

BACKGROUND

This action arises from a motor vehicle accident that occurred on May 21, 2000, wherein Adam Troy Downen, plaintiffs' son, was killed while riding with defendant John Pelham

McMurry, who was intoxicated. McMurry and Downen had attended a party held at the home of defendants Michael Angelo and Carol Anne Testa, following a high school graduation ceremony. The Complaint alleges that the Testas' daughter was in the graduating class, and that several teenagers were invited to the party, and were told that alcohol would be served. The Complaint alleges that McMurry and Downen attended the party where McMurry openly drank beer, and that they left in a car that McMurry was driving, and a collision occurred which took Downen's life. It is further alleged that Testas breached a duty of care and assisted and encouraged McMurry to drink, and that the Testas failed to control the consumption of alcohol at their home, and contributed to the delinquency of the minors, etc.

In the Testas' Answer, it was admitted that they had a party at their home, and that beer was present at the party. They admitted that minors were at the party, and that the party was a graduation celebration. However, they denied that they furnished beer to the teenagers, or that the teenagers were allowed to bring their own beer to the Testas' home. Defendants admitted that they bought a keg of beer, but denied serving it to underage drinkers, and while denying any duty of care, they asserted that plaintiffs' claims were barred by Tenn. Code Ann. §57-10-101.

Defendants assert that based upon the cited Code section, they could have no liability because they did not proximately cause decedent's injury.

The record contains several affidavits, including the affidavit of Rebecca Jane Marshall, who attended the Testa party, and recounted that Testa's daughter told her in advance that her parents would be providing beer, and that her dad had not decided on whether to get a keg or canned beer. She stated that there was a keg of beer at the party, as well as wine and beer furnished by the Testas in their refrigerator. She stated that Mr. Testa was at the keg at times handing beer to underage guests and filling their cups, and that Mr. Testa was drinking beer along with everyone, and that car keys were collected at first, but as the night wore on, and Mr. Testa became more intoxicated, the collection of keys was no longer mentioned. She further stated that Mr. Testa played a drinking card game with the teenagers in the garage.

The Affidavit of Dustin Colquitt stated that he attended the Testa party, and that he left at some point in the evening and came back, and his keys were not collected at either time. He also stated that he played the beer drinking card game in the garage, and drank beer with Mr. Testa, who became intoxicated.

The Trial Court granted Summary Judgment, and in its Opinion discussed Tenn. Code Ann. §57-10-101, and said that "the legislature has adopted an all encompassing principle to the effect that it is the consumption of alcoholic beverages, rather than the furnishing of those beverages, that is the proximate cause of injuries that are inflicted upon someone by an intoxicated person." The Court noted that exceptions were made in the next statutory section for sellers of alcohol (when underage drinkers or those who were obviously intoxicated were sold alcohol), but stated that the legislature did not restrict Tenn. Code Ann. §57-10-101 simply to the selling of alcohol. The Court stated that it was troubled by legislative history showing that the statute was

passed at the behest of the liquor industry and/or hotel, motel, and restaurant associations, but explained that the way the statute was worded required the conclusion that it applied to the facts of this case.

DISCUSSION

The Supreme Court has instructed on whether or not to grant a summary judgment and said:

> In determining whether or not a genuine issue of material fact exists for purposes of summary judgment, courts in this state have indicated that the question should be considered in the same manner as a motion for directed verdict made at the close of the plaintiff's proof, i.e., the trial court must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence. Then, if there is a dispute as to any material fact or any doubt as to the conclusions to be drawn from that fact, the motion must be denied. The court is not to "weigh" the evidence when evaluating a motion for summary judgment. The court is simply to overrule the motion where a genuine dispute exists as to any material fact.

Byrd v. Hall, 847 S.W.2d 208, 211 (Tenn. 1993) (citations omitted).

The Court made clear that the moving party has the burden of establishing that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. *Id*. This may be accomplished by either negating a critical element of the other party's case, or by establishing an affirmative defense. *Id*. The burden then shifts to the nonmoving party to show there is a genuine issue of material fact for trial, by affidavit or otherwise. *Id*.; Tenn. R. Civ. P. 56.

The Trial Court found the defendants were entitled to judgment as a matter of law, due to the language of Tenn. Code Ann. §57-10-101. Plaintiffs argue that the Code section should not apply to this case, because it should only apply to sellers of alcohol, and that even if applicable, it does not preclude liability on other claims asserted by plaintiffs.

Tenn. Code Ann. §57-10-101 reads as follows:

> **Proximate cause. -** The general assembly hereby finds and declares that the consumption of any alcoholic beverage or beer rather than the furnishing of any alcoholic beverage or beer is the proximate cause of injuries inflicted upon another by an intoxicated person.

The subsequent section (Tenn. Code Ann. §57-10-102) is entitled "standard of proof", and it states:

> Notwithstanding the provisions of § 57-10-101, no judge or jury may pronounce a judgment awarding damages to or on behalf of any party who has suffered personal injury or death against any person who has sold any alcoholic beverage or beer, unless such jury of twelve (12) persons has first ascertained beyond a reasonable doubt that the sale by such person of the alcoholic beverage or beer was the proximate cause of the personal injury or death sustained and that such person:
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> > (1) Sold the alcoholic beverage or beer to a person known to be under the age of twenty-one (21) years and such person caused the personal injury or death as the direct result of the consumption of the alcoholic beverage or beer so sold; or
> >
> > (2) Sold the alcoholic beverage or beer to an obviously intoxicated person and such person caused the personal injury or death as the direct result of the consumption of the alcoholic beverage or beer so sold.

These statutes have been considered in a few cases. One case discussing the application of these statutes is *Worley v. Weigels, Inc.*, 919 S.W.2d 589 (Tenn. 1996), wherein the plaintiff parents of a minor injured in a car accident while riding with an intoxicated driver (also a minor) sued the store which sold beer to the driver's friend. The Supreme Court found the statutes in question precluded recovery because the exceptions in Tenn. Code Ann. §57-10-102 would not apply, since the beer was not sold to the person who caused the injury. *Id.*

The Supreme Court observed that before the statute was enacted, the rule was that a jury would have to decide if the injury was reasonably foreseeable to the seller to determine if liability would attach.[1] *Id.* The Supreme Court found that the legislature changed this rule by enacting these statutes, and that the legislature's intent was to protect sellers from liability except in very distinct circumstances. The Court discussed that the bill enacting these statutes was promoted by the Tennessee Hotel/Motel Association to insulate sellers of alcohol from suits for injuries caused by their patrons, because many establishments were not able to obtain liability insurance. *Id.*

The Supreme Court also explained that "statutes in derogation of the common law are to be strictly construed and confined to their express terms", and that when the "words of a statute are plain and unambiguous, the assumption is 'that the legislature intended what it wrote and meant what it said.'" The Court found that these statutes were "models of clarity" and that "interpretation of their plain language would be an exercise in obfuscation." *Id.*

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[1]Unlike pre-statute cases dealing with sellers of alcohol (*see Brookins v. The Round Table, Inc.*, 624 S.W.2d 547 (Tenn. 1981)), prior cases dealing with social situations held that there was no liability for the person who provided alcohol in a social setting. *See Cecil v. Hardin*, 575 S.W.2d 268 (Tenn. 1978).

In *Mauldin v. Gray*, 1993 Tenn. App. Lexis 543 (Tenn. Ct. App. Aug. 18, 1993), this Court was faced with a factual scenario similar to this case. Two underage friends went to a party and drank beer that was provided by either the host or one of the friends, and in a social context. The two friends left the party and started driving home, and hit a pedestrian with the car. The pedestrian sued, and a jury verdict was entered for the defendant, who was actually the passenger in the car. On appeal, plaintiff argued that the trial court should have instructed the jury regarding Tenn. Code Ann. §57-10-102, in addition to its instruction given on Tenn. Code Ann. §57-10-101 regarding proximate cause. *Id.* This Court stated, "section 102 is directed to those who have sold alcoholic beverages or beer to another. It does not apply to those who furnish alcohol or beer to another as might occur in a social setting." The other case, *LaRue v. 1817 Lake Inc.*, 966 S.W.2d 423 (Tenn. Ct. App. 1997), involved an underage person who drove while intoxicated after having been to a bar, but claimed that the bartender had given him drinks without charge. The bartender testified that he did not serve him anything for payment or for free. This Court stated that for the exceptions in Tenn. Code Ann. §57-10-102 to apply, there had to be proof of a sale. *Id.* Plaintiffs argued that the statute should be construed as allowing the "furnishing" of alcohol to a minor to be sufficient for the jury to be able to decide whether the furnishing was the proximate cause of the accident, but this Court disagreed. The Court reasoned that it was "within the province of the General Assembly to establish and proclaim public policy", and that the General Assembly clearly expressed the public policy on this issue. Based upon the wording of the statute and the foregoing authorities, the plaintiffs' argument that the legislature intended that Tenn. Code Ann. §57-10-101 apply only to sellers of alcohol is without merit.

While, as the Supreme Court has said, the Statute is a model of clarity, we note the legislative history of the Act clearly shows the legislature expressed its intent to limit the exception to sales. In the State and Local Government committee meeting held on February 25, 1986, Senator Moore (sponsor of the bill) explained that he had received an opinion from the attorney general which stated that the bill would relieve host liability and place the burden on sellers. Senator Moore reiterated this in the Senate hearing held on February 27, 1986, and explained that "this was an issue for a lot of people." Senator Darnell proposed an amendment to the bill which would have, among other things, replaced the "sold" language in the exceptions with "furnished", and thus would have imposed liability on social hosts, but the amendment was voted down. There is no question that the legislature intended that social hosts would be insulated from liability. While this result may not be what the legislature intended with regard to a situation involving minors, this Court cannot ignore the legislature's statement of public policy.[2]

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[2] A majority of the states have adopted some type of "dram shop" statute, but a great number of them also impose social host liability when the alcohol is served to someone under the legal drinking age. *See* Colo. Rev. Stat. § 12-47-801; Fla. Stat. §768.125; Ga. Code. Ann. §51-1-18; Idaho Code §23-808; Minn. Stat. §340A.801; N.Y. Gen. Oblig. Law §11-100; Wis. Stat. §125.035. Other states have imposed liability on social hosts who serve alcohol to minors by court decision. *See Craig v. Driscoll*, 813 A.2d 1003 (Conn. 2003); *Horstman v. Farris*, 725 N.E.2d 698 (Ohio Ct. App. 1999); *Cleveland v. Remick*, 2000 WL 33961162 (Pa. Com. Pl. Oct. 4, 2000); *Knight v. Rower*, 742 A.2d 1237 (Vt. 1999); *Daniels v. Carpenter*, 62 P.2d 555 (Wyo. 2003). Our legislature continues

Plaintiffs further argue that even if the Statute does apply, it does not preclude liability on all of the claims asserted by the plaintiffs, which include substantial assistance/inducement of tortious conduct, negligence per se, voluntary assumption of duty, and common law duty of reasonable care.

Plaintiffs rely upon the case of *Huckeby v. Spangler*, 521 S.W.2d 568 (Tenn. 1975), for the establishment of their claim for substantial assistance/inducement of tortious conduct. In that case, the Supreme Court found the allegations of fact made in the complaint were sufficient to withstand a motion to dismiss, because the plaintiff had alleged that the defendants were acting as "co-conspirators" in the gambling enterprise, and the statutes prohibiting gambling were clear. This type of claim was recognized in *Cecil v. Hardin*, 575 S.W.2d 268 (Tenn. 1978), although ultimately rejected on the facts. The Court stated that to impose liability for such a claim, "the jury must find that the defendant knew that his companions' conduct constituted a breach of duty, and that he gave substantial assistance or encouragement to them in their acts." *Id.* at 272. In that case, the Court found that the claim could not be proven because there was insufficient evidence that the defendant assisted the driver in obtaining the drugs he had taken, and because even though the defendant provided some alcohol to the driver, the court held that "to impose liability on this basis would greatly expand the liability of those who provide alcohol to others in a social context, an expansion that we believe would be inappropriate." *Id.* at 272. The Court had previously explained that "at common law, an individual who furnished alcohol to another was not liable for any damages resulting from the other's intoxication, even if those damages were foreseeable, in part because the other's acceptance of the intoxicants was considered an independent intervening cause, cutting off any liability." *Id.* at 271.

Next, plaintiffs argue that the Testas should be held liable under a theory of negligence per se, because they violated criminal statutes of this state by providing alcohol to minors. In *Alex v. Armstrong*, 385 S.W.2d 110, 114 (Tenn. 1964), the Supreme Court stated:

> It has long been well settled in this State that a violation of a statute which causes injury to one within the protection of the statute is negligence per se and actionable. In order to found an action on the violation of a statute . . . the person suing must be such a person as is within the protection of the law and intended to be benefitted thereby.

But the Supreme Court in *Worley* said:

> With the enactment of these statutes, the legislature made a definite distinction

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to refuse to impose liability, SB/HB 1758/1916 which would include the "furnishing" of alcohol to persons under age 21 within the scope of the Dram Shop Statute failed this year in Senate Judiciary Committee.

> between the basis for civil liability and the basis for criminal liability incident to the sale of alcoholic beverages. These statutes, rather than the duties imposed by criminal statutes, determine the civil liability of the seller. These statutes declare that the "consumption" rather than the "furnishing of" intoxicating beverages is deemed the "proximate cause of injuries inflicted" by the intoxicated person, except that a sale may be deemed to be the proximate cause when the sale is to a person known to be a minor and whose consumption causes the injury or to a person who is "obviously intoxicated" and whose consumption caused the injury. Since the purchaser in this case did not consume the beverage purchased, the accident was not caused by the purchaser's consumption of the beverage. Therefore, there is no liability on the seller.

Worley v. Weigels, Inc., 919 S.W.2d 589, 593 (Tenn. 1996). We hold that the Statute is applicable to the *per se* claims and affirm the Trial court on this issue.

Plaintiffs also argue that the Testas owed a heightened duty of care because of the age of the partygoers, and because they voluntarily assumed the duty of collecting keys, and then neglected to continue this practice. Defendants argue that on any negligence-based claim regarding provision of alcohol, there can be no finding that the Testas proximately caused the injury in light of Tenn. Code Ann. §57-10-101. This argument fails to recognize, however, that plaintiffs are alleging negligence in duties owed above and beyond any duty regarding the furnishing of alcohol.

Plaintiffs allege that the Testas began taking up keys at some point in the party, due to concerns about drunk driving, but the practice was discontinued as the night wore on and as the Testas became more intoxicated themselves. Thus, plaintiffs allege the Testas voluntarily undertook this duty to prevent intoxicated persons from leaving the party and driving a car, but that they were negligent in the performance of that duty. The question of whether one has voluntarily assumed a duty is a question of law. *Stewart v. State*, 33 S.W.3d 785 (Tenn. 2000). In further explanation of the doctrine of assumption of duty, the Supreme Court said:

> '[I]f the defendant does attempt to aid him, and takes charge and control of the situation, he is regarded as entering voluntarily into a relation which is attended with responsibility. Such a defendant will then be liable for a failure to use reasonable care for the protection of the plaintiff's interests.' . . . 'Where performance clearly has been begun, there is no doubt that there is a duty of care.'"

Lindsey v. Miami Development Corp., 689 S.W.2d 856, 860 (Tenn. 1985)(citations omitted).

> Restatement 2nd of Torts, § 324(a) provides as follows:
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> One who undertakes gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Judge Susano, in *Lett v. Collis Foods, Inc.*, 60 S.W.3d 95 (Tenn. Ct. App. 2001), noted that it was not clear whether Tennessee had fully adopted the foregoing section of Restatement. In *Lett*, we found the facts of that case did not establish a duty under the Restatement, but nevertheless, recognized that a duty could arise as outlined by the Restatement.

A persuasive case is found *Wakulich v. Mraz*, 2003 Ill. Lexis 19 (Ill. Feb. 6, 2003), wherein the defendants were hosting a party where alcoholic beverages were served to minors. The Illinois Court acknowledged that there was no social host liability for the serving of alcohol (due to an Illinois statute), but stated that the hosts could have been held liable because the plaintiff's daughter died after becoming sick and then unconscious, and being left in a room by herself with defendants checking on her periodically and administering to her, but refused to call for help or take her to seek medical attention. *Id*. The Court concluded that plaintiff had stated sufficient allegations to state a claim under a voluntary undertaking theory, and remanded the case for further proceedings. *See also Nisbet v. Bucher*, 949 S.W.2d 111 (Mo. App. 1997).

In their brief, defendants argue that the keys of McMurry were not collected and since "the keys of the driver at issue, McMurry, were not collected and no duty was therefore created as to him or his passengers." There is no evidence in the record that this driver's keys were taken, but there is material evidence that the defendants recognized the hazard of allowing the teenagers to drive while intoxicated and undertook and voluntarily assumed the responsibility of collecting ignition keys. There is further material evidence that they became intoxicated and did not properly discharge the duties they voluntarily assumed. *See Marr v. Montgomery Elevator Co.*, 922 S.W.2d 526, 529 (Tenn. Ct. App. 1995). We believe there is adequate material evidence based upon the allegations to withstand a summary judgment on this issue. Accordingly, we vacate the summary judgment on this issue.

We affirm the grant of summary judgment in part, and vacate the summary judgment in part and remand for further proceedings consistent with this opinion. The cost of the appeal is assessed one-half to plaintiffs and one-half to Michael and Carol Testa, defendants.

HERSCHEL PICKENS FRANKS, J.